THE ONTARIO HUMAN RIGHTS CODE,
S.O. 1981, c.53, as amended

IN THE MATTER OF the Complaint of Ms. Jeanne Fakhoury, ("the complainant") alleging discrimination in accommodation on the basis of family status by Las Brisas Ltd., carrying on business as Darcel Condominium Apartments and East West Management Company, Carl Epstein and Estelle Epstein ("the respondents").

BOARD OF INQUIRY: Michel G. Picher

APPEARANCES:

Ms. A. Lyon, Counsel for the Ontario Human Rights Commission and the complainant

Carl and Estelle Epstein, representing all named respondents

Hearings in this matter were held in Toronto on July 28, 1986, October 9, 1986 and February 4, 1987.

DECISION AND ORDER

This Board of Inquiry is called upon to deal with a matter of first impression. The complaint, filed by Ms. Jeanne Fakhoury, alleges that the respondents refused to lease her a two-bedroom apartment by reason of her family status, contrary to section 2(1) of the Ontario Human Rights Code, 1981. Counsel for the Ontario Human Rights Commission advises that the operative provision within that section, which prohibits discrimination in respect of the occupancy of accommodation because of family status, has not yet been considered or applied by a board of inquiry constituted under the Code or by any Court of this province.

The provisions of the Code pertinent to this complaint are as follows:

> 2.(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status, handicap or the receipt of public assistance.
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> . . .
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> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
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> 9. In Part I and in this Part,
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> . . .

(c) 'equal' means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination;

(d) 'family status' means the status of being in a parent and child relationship;...

. . .

20.(4) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination because of family status is not infringed by discrimination on the ground where the residential accommodation is in a building, or designated part of the building, that contains more than one dwelling unit served by a common entrance and the occupancy of all the residential accommodation in the building or in the designated part of the building is restricted because of family status.

The facts are not in dispute. Ms. Fakhoury is the mother of three children. At the material time she had a girl, aged fifteen months and two boys who were three and fourteen years of age, respectively. In June of 1984, because of marital difficulties, she decided to leave her husband and move into an apartment with her three children. In response to a newspaper advertisement, on June 16, 1984 Ms. Fakhoury attended at a Mississauga apartment building owned and managed by the respondents. For the purposes of this Board it is not disputed that Mr. and Mrs. Epstein exercise effective ownership and management of the respondent corporations and Darcel Condominium Apartments, and have properly been made respondents in their own right.

Ms. Fakhoury was shown a two-bedroom apartment by its then occupant, a Mrs. Trudeau, who was seeking to sublet it. The apartment is

situated on two levels, and has two bedrooms as well as a den. Being satisfied with what she saw the complainant proceeded to the rental office where Mrs. Helen Bradley, the rental agent employed by the respondents, gave her an application form. She was instructed to return the form with a certified cheque. That day being a Saturday, she resolved to take the apartment by submitting a certified cheque on the following Monday, June 18, 1984, since she had no opportunity to get to a bank before then. She did so, and was advised on the Monday by Mrs. Bradley that she would be notified within a couple of days as to whether her application was accepted. On that occasion she left with Mrs. Bradley a certified cheque in the amount of $1,159.00 as a deposit on the first and last months' rent.

The following day, on or about June 19, 1984, Ms. Fakhoury received a telephone call from Mrs. Epstein in her capacity as the property manager of the apartment building. She informed Ms. Fakhoury that she could not rent her the two-bedroom apartment, described as apartment 365, because it was a two-bedroom unit. She explained that the policy of the respondents is that where a rental is for three children and an adult the lease must be for a three-bedroom unit. Mrs. Epstein offered the complainant another unit, described as apartment 304, containing three bedrooms plus a den. That unit was available for $610.00 per month, as opposed to the $550.00 per month for the two-bedroom unit. Although she was not pleased with this development, the complainant felt that she had no choice. On Wednesday, June 20, 1984, after visiting the three-bedroom apartment she made an initial decision to take it,

providing the respondents with an additional cheque for $86.00 to cover the balance of the deposit.

It is not disputed that Ms. Fakhoury then registered her displeasure with the owners of the apartment building. She related that she felt that the den in the two-bedroom apartment could easily serve as a bedroom for one of her children, and that there was no practical reason why she was required to take a three-bedroom unit. Ms. Fakhoury's concern over the more costly arrangement that initially she felt compelled to accept soon caused her to reconsider taking the three-bedroom apartment. She decided to revoke the agreement and on June 29, 1984 wrote the following letter to Mrs. Epstein:

> Dear Mrs. Epstein:
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> Please be advised that I am no longer interested in renting apartment #304 at...Darcel, for the following reasons:
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> - I had wanted to sublet and paid deposit of $1,159.00 for apartment #365 at the same address; a 2 bedroom plus den.
> - You phoned to explain your rental policy of renting 3 bedroom plus den apartments to house 4 people, in my case, myself and three children. On this basis, you said you could not rent me the 2 bedroom plus den.
> - I subsequently discovered that you had a number of 2 bedroom units housing at least 4 people.
> - This inconsistency leads me to question your business practices as landlord, and thus my security as tenant.
>
> Yours truly,
>
> JEANNE A. FAKHOURY

The complainant's evidence establishes that she stopped payment on the additional cheque for $86.00, but has never received a refund of her original deposit. This appears to have caused her considerable hardship at the time. While she was then intent on separating from her husband, she had only limited means to do so. The loss of her deposit cheque of over $1,000.00 substantially foreclosed her ability to secure alternative accommodation for herself and her children. While she did have a job, she did not have sufficient savings to pay the deposit on an alternative apartment unit. In the result she was forced to continue living with her husband, a circumstance which she describes as increasingly stressful in the ensuing months, although it appears that more recently there has been a degree of conciliation between them.

The evidence establishes that following receipt of the letter of June 29, 1984 Mrs. Epstein confirmed to the complainant that she would try to re-rent the three-bedroom apartment as soon as possible. It appears that she was unable to find another tenant for that apartment until October 1, 1984. The tenancy agreement signed by the complainant expressly provides that the deposit is to be forfeited in the event that the applicant should fail to honour the tenancy agreement following its acceptance by the landlord. Consequently, the respondents treated the complainant's deposit as compensation for the months of July, August and September, during which the apartment remained vacant.

The evidence further establishes that the policy of the respondents in respect of rentals to tenants with children has been clearly and consistently applied since they purchased the building. The policy is that no children are permitted in a one-bedroom apartment, a maximum of two children may live in a two-bedroom unit and, as a general rule, three children in a three-bedroom unit. In the apartment in question, on Darcel Avenue in Mississauga, it appears that there are 38 two-bedroom apartments. It is not disputed that in these two-bedroom apartments there are a number of tenancies of at least four persons. In two cases there are five persons occupying a two-bedroom apartment, although these appear to involve tenancies which predate the purchase of the building by the respondents.

The dispute arising out of these facts is fairly clearly defined. The respondent rents two-bedroom units to families with four persons. It does so, however, only if two of those persons are parents and two are children. In the event that one of the persons is a single parent and three are children, it refuses to do so. That is what transpired in the instant case in the denial of the two-bedroom apartment to the complainant. The narrow issue is whether the actions of the respondents constitute discrimination within the meaning of section 2(1) of the Ontario Human Rights Code as a denial of accommodation on the basis of family status.

Counsel for the claimant and the Human Rights Commission submits that the actions of the respondents in respect of Ms. Fakhoury disclose an infringement of her rights protected by section 2(1) of the Ontario Human

Rights Code. She argues that her family of four, including herself as a single parent and her three children, are entitled to the same treatment with respect to the occupancy of a two-bedroom apartment as would be accorded to another family of four made up of two parents and two children. Simply put, her submission is that by treating the Claimant and her three children differently than another group of four individuals, purely on the basis of their parent and child relationship, the respondents have unlawfully discriminated against them on the basis of family status.

Counsel submits that the amount of $1,159.00 paid by the Claimant on account of an agreement to rent an apartment which was subsequently denied to her because of discrimination has, by virtue of that fact, been wrongfully obtained and withheld by the respondents. On behalf of the Commission she submits that this Board of Inquiry should order the return of those monies to Ms. Fakhoury, with interest from October 23, 1984, the date the respondents received notice of this complaint. In addition counsel seeks an order for the payment of further compensation in the amount of $500.00 for the mental anguish caused to the Claimant. She makes that request under section 40 of the Code which provides, in part, as follows:

> 40.(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in

respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

Counsel submits that by depriving the Claimant of the full amount of her deposit money for the two-bedroom apartment contrary to the provision of the Code, the respondents effectively prevented Ms. Fakhoury from obtaining any other accommodation. She argues that the actions of the respondents barred her opportunity to escape the stresses of continuing to live in a matrimonial home where life had become intolerable for her. It is submitted that in all of the circumstances the Claimant was subjected to mental anguish, both in relation to the loss of her deposit and the effective elimination of her financial ability to escape a painful living situation. Lastly, the Comission seeks a further order directing the respondents to cease discriminating on the basis of family status, with the directive that while the respondents may have a justifiable business reason to limit the number of individuals in an apartment unit, they may do so on a limitation of persons, and not on the basis of parent and child status.

The submissions of the respondents were relatively short. Mr. Epstein submits that there has been no violation of the Ontario Human Rights Code. He stresses that the evidence discloses only two apartments with two-bedrooms having more than four people in them, and that the two apartments in

question were rented by the previous landlords, before the respondents took control of the building. Noting that the Claimant has apparently reconciled with her husband, Mr. Epstein suggests that in fact she did not intend to move into the apartment, and sought relief from her obligations under the Landlord and Tenant Act by making a claim under the Ontario Human Rights Code. Mr. Epstein describes the Code as vague, and submits that the practice of the respondents of requiring tenants with three children to live in a three-bedroom apartment is not discriminatory within the terms of the Code.

Do the facts disclosed establish a violation of the Ontario Human Rights Code by the respondents? As noted, this Board of Inquiry is called upon to interpret and apply for the first time the prohibition against discrimination on the basis of family status in the granting of residential accommodation as provided in the Code. This is not, in other words, a case in which reference to direct prior authority is available. In any case a review of the legislative history of a statutory enactment, including reference to case law prior to the introduction of the legislation, the evolution of the legislation itself, with reference to public reports and other documents describing the mischief intended to be remedied by the legislation, are generally a useful aid to interpreting the intention of the Legislature. That is doubly true in a case of first impression such as this. The Board therefore finds it useful to consider, however briefly, the origins and evolution of concerns which have, in recent years, given rise to legislation in a number of jurisdictions aimed at defining and protecting the rights of families against the harmful effects of

discrimination in access to living accommodation, and to examine in particular the background to the legislation now in force in Ontario.

The rights of families, and particularly of children, have become the subject of increasing attention in recent times. The concern for the family, manifested in numbers of public enactments in Canada as well as in other jurisdictions, was seminally articulated in the Universal Declaration of Human Rights. That document of the United Nations, expressly referred to in the preamble of the Ontario Human Rights Code, 1981, contains the following declaration in article 16(3):

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The importance of the family is further underscored by the language of article 12 of the Universal Declaration of Human Rights which provides:

> No-one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

In the enactment of the Ontario Human Rights Code, 1981 the Legislature of this province has sought to give substance to these statements of universal value and to assure their enforceability in the day-to-day life of

the people in this province. That is reflected in the terms of the preamble to the Ontario Human Rights Code, which is as follows:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;
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> AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario;
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> Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:....

The availability of living accommodation for families, particularly within large urban centres, has become an increasing problem in the latter half of the twentieth century. Considerable academic, judicial and legislative debate has addressed the competing interests of adults, particularly those of senior years, who prefer to live in apartments, condominiums or retirement communities without children and, on the other hand, the interests of families with children seeking reasonable residential accommodation, particularly in high density urban areas. A complicating factor within the cities has been

the increase in apartment accommodations reserved for adults only, and occupied not so much by senior citizens as by tenants who are single or who, whether married or in a common-law relationship, do not have children. It appears beyond dispute that these developments have operated to restrict the access of families to significant segments of accommodation.

This issue reached critical proportions, at least in the City of Toronto, in the early 1980s. On December 1, 1981 a Committee of the Legislature studying the then proposed amendments to the Ontario Human Rights Code was made aware of a current study which found that between forty and fifty percent of the rental accommodation listed with rental referral agencies would not allow families with children as tenants. Given the extremely low vacancy rate for rental accommodation in the city at that time, fear was expressed for an impending crisis given the hardship resulting to families in need of apartments in Metropolitan Toronto (see Hansard, Legislature of Ontario, May 1981 at p.4118).

These concerns reflect, in part, the findings and recommendations of a comprehensive review of human rights in Ontario published by the Ontario Human Rights Commission, entitled Life Together: A Report on Human Rights in Ontario (Queen's Printer for Ontario, July 1977). At p.72 of the Report the Commission related the following:

> Another related area of concern which was frequently raised in the briefs and at the public hearings was the question of discrimination against families with children. This

problem, which has become more acute during the current period of slow housing starts and scarcity of rental accommodation, is more serious in some communities than in others.

A few municipalities, including the City of Toronto, have taken some steps to remedy this situation by adopting municipal by-laws relating to the undue discrimination against families with children. Towards the same end, they have also restricted permits for the constuction or conversion of 'adults only' apartment buildings. These steps have been taken to deal with a specific social problem. The intention has not been to infringe unnecessarily on the right of individuals to live and associate with whom they wish. Some individuals, for example, wish to live only with people of their own general age group or prefer to live without children around them.

The crucial question, however, is whether or not enough suitable housing accommodation for families with children is available within a particular area or community. If the answer is 'no', then 'adults only' policies which discriminate against families with children should not be allowed.

To meet these problems, the Commission recommends that 'family relationship' be added to the Ontario Human Rights Code as a ground on which discrimination is prohibited.

The Comission also recommends that an exempting provision be included in the Code to allow bona fide restrictions on housing of senior citizens buildings, nursing homes, hostels and in other dwellings where family relationship may be a legitimate consideration. ...

The recommendations of the Commission to the Legislature of Ontario include the following proposal, at p.106 of the Report:

The Commissioners recommend that 'family relationship' be added to the Ontario Human Rights Code as a ground on which discrimination is prohibited. This would enable the Commission to investigate many of the problems facing single-parent families and families with children.

Prior to the enactment of protections against discrimination in accommodation on the basis of family status there were substantial grounds to doubt the effectiveness of the common law to safeguard the interests of parents and children in respect of equal access to the purchase or rental of living accommodation. The dimensions of the problem are reflected in the extensive case law generated in the United States. At the turn of the 1980s the problem of discrimination against families in housing was viewed as having reached crisis proportions. Studies estimated that as of 1980 some 76% of the rental apartment units in the U.S. excluded children entirely or, alternatively, limited their access to rental accommodations. (See Stanley, "Age Restrictions in Housing: The Denial of the Family's Right to its Integrity" [1984] 19 Harvard Civil Rights - Civil Liberties Law Review 61 at p.62.) The use of restrictive covenants and municipal zoning ordinances prohibiting access to apartments and other rental accommodation to families with children received considerable attention in the American courts both before and since that time. The ability of a municipality to use its zoning authority as an instrument to exclude children by the creation of "adults only" communities was severely restricted by the decision of the Superior Court of New Jersey in **Molino v. Mayor of Glassboro**, 281 A. 2d 401 (1971). In that case a zoning ordinance did not specifically exclude children, and contained no specific reference to age. However, the Court found that the obviously restrictive limitation on multi-bedroom units in the apartment complex had the intention, and the de facto result, of excluding families with children. Expressing the belief that there is a right to live as a family, the Court concluded that de facto age barriers constituted an abuse of the zoning powers of the

municipality and violated the equal protection provisions of the United States Constitution. (See also Hinman v. Planning and Zoning Commission, 214 A. 2d 131 (Conn C.P. 1965).)

Subsequent cases in the United States, however, have not been so clearly protective of family interests. This appears to turn, in part, on the interpretation applied to two decisions of the Supreme Court of the United States. In the first case, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) residents of a village sought to overturn a zoning ordinance which required that single family dwellings be occupied by a traditional family or no more than two persons who are unrelated. The Supreme Court found that the ordinance so framed did not violate constitutional protections. The decision has not generally been interpreted, however, as being supportive of family rights. In subsequent cases lower courts interpreted Belle Terre on broader grounds as implicitly endorsing the legitimacy of restrictive zoning ordinances. If zoning power could be used to restrict certain residential areas to families it must, according to some courts, conversely be available to allow the restriction of other areas to other groups. On this interpretation of Belle Terre, zoning ordinances containing age restrictions were repeatedly upheld by the lower courts (Sheppard v. Woodland Township Commission and Planning Board, 364 A. (2d) 1005 (1976); Taxpayers Association v. Weymouth Township, 364 A. 2d 1016 (1976); Maldini v. Ambro, N.E. 2d 403 (NYCA, 1975), Cert. Denied, 423 U.S. 993 (1975).)

A second pronouncement of the Supreme Court of the United States was issued in **Moore v. City of East Cleveland**, 431 U.S. 494 (1977). That case concerned the conviction of a grandmother for a violation of a housing ordinance which prohibited occupance of the residence by her extended family, two of whose members were cousins rather than brothers. The Court found that the narrow definition of a single family implicit in that restrictive zoning was not a reasonable regulation of land use within the constitutional authority of the municipality. Both **Belle Terre** and **East Cleveland** have been hailed by some as reconfirming constitutional guarantees to the integrity of the family, be it nuclear or extended. These decisions are advanced as strong authority against provisions in zoning by-laws, restrictive covenants and condiminium agreements that purport to exclude families with children from residential accommodations.

It appears, however, that subsequent case law in the U.S. has continued to take a different approach, with the **Belle Terre** and **East Cleveland** decisions being construed as relating only to zoning powers. A spate of lower court decisions has therefore tended to support restrictive covenants based on age, fashioned by private contract. A prominent example is **Riley v. Stoves**, 526 P. 2d 747 (1974), a decision of the Court of Appeal of Arizona decided shortly after **Belle Terre**. In that case the Court sustained an action seeking the eviction of a family with two children from a mobile home park which was subject to a contractual covenant restricting residents within it to persons at least 21 years of age. In fact, in that decision, the Court

relied on Belle Terre as authorizing restrictions, whether public or private, on classes of persons entitled to live within a subdivision.

The debate within the American courts is perhaps best reflected in the case of White Egret Condominium Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979). In that case a condominium association objected to the transfer of part of the interest of an owner to his brother because the latter had a child in violation of an express age restriction within the condominium agreement. The Florida District Court of Appeals found that the age restriction was unconstitutional in that it was in restraint of the resident's right to marriage, procreation and association, and also violated his right to equal protection of the law. In support of its conclusion reference was made to the East Cleveland decision of the Supreme Court. That determination, was reversed on appeal by the Florida Supreme Court (379 So. 2d 346 (Fla. 1979)). The higher Court confined the ratio of the East Cleveland case to the context of public zoning and found the private covenant to be a reasonable restriction on the use of land not inconsistent with the values underlying the East Cleveland decision.

The foregoing cases, which are by no means exhaustive of the American jurisprudence, reflect the struggle of the courts to come to grips with what sometimes appear to be irreconcilable interests. Nuclear families, extended families, unrelated groups such as fraternities, the residents of group homes, co-operatives and other social groupings, including senior citizens, all

assert claims to live in residential areas or buildings suited to their needs. These claims are often difficult to reconcile.

The case law in Canada has not been as prolific as that in the United States respecting the residential rights of families. Such cases as there are, however, particularly within Ontario, confirm that the common law did not give extensive protection or relief to families whose access to living accomodation is increasingly restricted. That is reflected in the outcome of the decision of the County Court of the Judicial District of York in York Condominium Corporation No. 216 v. Borsodi (1983), 148 D.L.R. (3d) 290. In that case a condominium complex consisted of three highrise buildings containing a total of 710 units. The North Tower of the complex, a seventeen storey building with 231 units contained a restriction, incorporated within the declaration made under the Condominium Act, R.S.O. 1970 c.77 which limited the right of residence to adults only. In the fall of 1980 it became apparent that some 14 units in the North Tower were in fact occupied by families with children. The property managers commenced a programme of eviction which was successful in all but one case. They then moved in court to enforce the terms of s.18 of the Condomimum Declaration, restricting the facility to adults only, against the one remaining family.

In court the defendants questioned the legality of the Declaration effectively prohibiting the residence of children. This objection was dealt with in the following terms by the Court at pp.296-97:

The defendants also submit that s.18 of the Declaration is unenforceable.

In support of that position they rely upon s.15 of the Canadian Charter of Rights and Freedoms which provides that every person is equal before and under the law without discrimination based on age or other matters. They overlook that that section, by reason of s.32(2), shall not have effect until three years after s.32 comes into force. That time period has not yet expired.

In any event the application of s.15 would seem to me to be limited by the provisions of s.1 of that Charter which states that the guarantee set forth is:

> '...subject only to such reasonable limits prescribed by the law as can be demonstrably justified in a free and democratic society.'

I note that the Human Rights Code, 1981 (Ont.), c.53, of the Province of Ontario contains provisions expressed to ensure freedom from discrimination because of age and other matters. However, that legislation [s.9(a)] specifically provides that in relation to those provisions 'age' means 'an age that is eighteen years or more'. It appears therefore that the Legislative Assembly recognizes that there are situations in which persons under the age of 18 might, for desirable or legitimate purposes, be dealt with in a manner different from that applicable to older persons.

In my view that objection to the plaintiff's position must fail. Even if s.15 of the Canadian Charter of Rights and Freedoms had effect, the limitation set forth in s.18 of the Declaration is demonstrably justified in a free and democratic society. The Legislative Assembly of the Province of Ontario recognizes 18 years as the lower limit in respect of its efforts to prevent discrimination because of age. Further the Declaration is in the nature of a private agreement among all of the owners of units in the Condominium, including the defendants, for their joint and several benefit. The owners of the other 709 units in the complex, especially, in this instance the 230 in the North Tower, are entitled to the protection of their contractual and property rights. If those rights are not protected they perceive, with cause, that their enjoyment of their property and thus their quality of life will be adversely affected.

It is noteworthy that the Human Rights Code was relied upon by the Court in justification of a plainly discriminatory rule. In granting the mandatory injunction requiring the defendants to comply with s.18 of the Condominium Declaration, effectively requiring them to remove their child from the accommodation, the Court cited with approval the reasoning and conclusions of a number of the American court decisions, including Riley v. Stoves, the decision of the Court of Appeal of Arizona described above. The Court also supported its decision that the terms of the declaration prohibiting children were not ultra vires the condominium corporation, and fell within its powers to make a declaration containing "provisions respecting the occupation and use of the units", citing a similar conclusion of another County Court in Re Peel Condominium Corporation No. 78 and Harthen (1978), 20 O.R. (2d) 225; 87 D.L.R. (3d) 267.

It has been suggested that the decision of the Court in the York Condominium case is grounded on doubtful legal reasoning. One commentator has argued that the prohibition against discrimination on the basis of family status within the Human Rights Code should have been construed as overriding any contrary provision in a declaration made under the Condominium Act. It is further argued that the Court in York Condominium leant its authority to support an arrangement effectively excluding a child from accommodation, and by extension that child's family, contrary to public policy. (See G. Richardson, Case Comment, (1984) 62 Can.B.Rev. 656.)

The difficulty with that criticism is that the Code, as it stood both at the time of the York Condominium case and at the time of the incident giving rise to this complaint, expressly provides an exception in s.20(4) which permits the maintenance of "adult only" buildings. It should be noted that in any event in the future that argument is academic since s.20(4) of the Ontario Human Rights Code was repealed by s.10(14) of the Equality Rights Statute Law Amendment Act, 1986 (Bill 7 - Royal Assent December 18, 1986). "Adult only" buildings are now prohibited by the Code, and a case like York Condominium should not arise again in Ontario.

The parties did not refer the board to any decision in Ontario considering or interpreting the prohibition against discrimination on the basis of family status under the Ontario Human Rights Code. There does appear to be one case, however, albeit not in the area of the right to accommodation. In Re Royal Insurance Company of Canada and Ontario Human Rights Commission (1985), 51 O.R. (2d) 797 (Div.Ct.) the Court was called upon to consider whether an insurance contract violated the prohibition in s.3 of the Human Rights Code which provides as follows:

> Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap.
>
> [emphasis added]

The complainant maintained that the imposition of an additional premium for his automobile insurance contract in respect of his sixteen-year old son was in violation of the foregoing provision. A board of inquiry chaired by Professor F.H. Zemans found that the insurer was in breach of the Code. The Divisional Court quashed the decision of the board on two grounds. Firstly, it found that the Code could not operate prospectively, and could therefore not affect the insurance contract under consideration because it had been entered into several months prior to June 15, 1982, the date the operative provision of the Code was proclaimed in force. Secondly, in an alternative or obiter observation, the Court disagreed with the analysis of the board of inquiry which found that family status as a basis of discrimination involved the age, sex and marital status of a particular child. The Court reasoned that in the case at bar it was not the parent and child relationship that occasioned the higher premium, but solely the age of the driver, being less than twenty-five years. The Court concluded that while distinctions are made in the insurance contract on the basis of age, sex and marital status of drivers, all parents are treated the same in the application of those distinctions, and discrimination on the basis of a parent/child relationship is therefore not established.

A number of other jurisdictions have enacted prohibitions against discrimination on the basis of family status. The Government of Canada has so provided in s.3(1) of the Canadian Human Rights Act S.C. 1976-77, c.33 as amended. An analogous provision is found within s.4(1) of the Fair Practices Ordinance of the Northwest Territories (R.O.N.W.T.) 1974, c.F2 as amended, which prohibits discrimination in the granting of accommodation on the basis

of "age or family". While Quebec legislation does not make specific provision for family status as a separate head of discrimination, that Province's Charter of Human Rights and Freedoms does prohibit discrimination on the grounds of an individual's "civil status", a term whose scope is generally considered to include parent and child relationships (see The Fountainhead Fun Centres Limited and Ville de St. Laurent [1979] C.S. 132 (Q.S.C.) and generally, Tarnopolsky and Pentney, Discrimination and the Law at pp.9-12 to 9-15).

The only other jurisdiction in Canada which prohibits discrimination on the basis of family status is Manitoba. Section 1(d.1) of the Human Rights Act S.M. 1974, c.65, as amended, contains the following definition:

> 1. In this Act
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> . . .
>
> (d.1) 'family status' for the purpose of this Act includes the status of an unmarried person or parent, a widow or widower or that of a person who is divorced or separated or the status of the children, dependants, or members of the family of a person;

Section 4(1) of the Act prohibits discrimination in the occupancy of housing accommodation. It is interesting to note that section 4(4) of that statute expressly permits the granting of preference in accommodation "to elderly persons...in any building that is designed or used primarily for elderly persons".

There is one reported decision involving the interpretation of "family status" under the Manitoba legislation. In **Mabel Monk v. C.D.E. Holdings Limited, Dakota I.G.A. and Dennis Hillman** (1983), 4 C.H.R.R.D./1381 adjudicator Paul S. Teskey found in favour of a complainant who was discharged from her employment because of a dispute between her husband, a shareholder in the business where she worked, and the other shareholder-owners of the business. The board of adjudication found that the complainant was discharged without reasonable excuse, primarily because of her marital relation with her husband, and ordered compensation accordingly. While the analysis is not specific on this point, it appears that the adjudicator viewed the husband and wife relationship as falling within the concept of "family status" as it is more broadly conceived under the Manitoba statute. To the extent that the case does turn on the somewhat different provisions of the Manitoba **Human Rights Act** it is, apart from the excellent analysis found within it, of limited assistance in the case at hand.

There is one unreported decision of a British Columbia board of inquiry decided in 1975 which, although not identical, is in some ways analogous to this case. In **Warren v. F.A. Cleland & Son and Fowler** (noted in Tarnopolsky and Pentney, above at p.9-4 et seq.) a woman who was separated from her husband was denied rental accommodation in a house. Although she had three children, the owners took the position that they wanted to rent to a "family". The owners expressed the view that the house and property could not be properly maintained by a single woman with children, suggesting that she would be unable to maintain the large yard and garden. The complainant's

allegation of discrimination based on "sex" and "marital status" was sustained by the board of inquiry. "Family status" is not specifically provided for as a prohibited ground of discrimination under the British Columbia Human Rights Code (S.B.C.) 1973, c.119 as amended.

Against the background of the foregoing legislative history and jurisprudence I turn to consider the merits of the instant complaint. The material facts are neither complex nor essentially disputed. The respondents are in the business of renting living accommodation in the form of one, two and three-bedroom apartments. They have no prohition against children residing in their building. They do, however, have rules as to the kinds of families which will be allowed access to certain types of accommodation. For example, no children are permitted in a one-bedroom apartment. While it appears undisputed that two adults would be permitted to share such a facility, it seems that a single parent with one child would not. Similarly, any tenant with two children is required to take a two-bedroom apartment, as may a couple with two children. In other words, a married couple with two children, being a total of four persons, are allowed to occupy a two-bedroom apartment. On the other hand, four persons comprised of a single parent with three children are denied a two-bedroom apartment, and forced to rent a unit with three bedrooms.

In this case that rule denied to the complainant access to the two-bedroom apartment for which she initially applied. She saw no practical impediment to living within that accommodation with her three children. It is

described as a spacious apartment on two levels, including two bedrooms and a den which could, in her opinion, serve as as third bedroom.

It should be stressed that this is not a case in which the respondent landlords have evidenced bad faith or hostility towards children. It is their honestly held belief that the rules which they have established respecting the occupation of the apartments in question are neither unreasonable nor discriminatory against families. It was argued by the respondents that these rules are justifiable, in part, as a means of controlling the population density within their buildings. As a general matter I accept that that is a legitimate consideration for any landlord. I have difficulty, however, seeing how that concern operates in the instant case. The respondents readily admit that four persons are permitted to occupy a two-bedroom apartment, as long as two of them are adults. The occupation of the same unit by four persons, three children and a single parent, does nothing to change the density of residents in their buildings, although it would obviously bear on the number of children who comprise that density.

The issue is whether that kind of distinction is permissible, or whether it is disrimination on the basis of "family status", prohibited by s.2 of the Ontario Human Rights Code. A related issue is whether the actions of the respondents fall under the exception of section 20(4) of the Code. Because of the seminal nature of this case, the Board of Inquiry invited specific separate argument from the parties on that question. Upon a careful review of the submissions I am satisfied that section 20(4), in force at the time of this

complaint but since repealed, has no application in the instant case. It is plain from an examination of the history of the Ontario Human Rights Code that subsection (4) of section 20 of the Code was enacted initially as a compromise, to permit the establishment of "adult only" buildings or the reservation of portions of buildings or residential complexes exclusively to adult only occupancy. It would make little sense and be inconsistent with the overall purpose of the prohibition against discrimination on the basis of family status to conclude that by the terms of section 20(4) of the Code the Legislature intended that the owner of an apartment building could admit children as residents, but could arbitrarily restrict their numbers through a formula that would not apply to parents or other adults. If that were so, the protections of section 2 of the Code would be virtually meaningless to safeguard the integrity of "family status" in the granting of residential accommodation. The better view is that, out of a concern for those circumstances in which an "adult only" facility is appropriate, as in the case of senior citizens' residences, the Legislature framed the "all or nothing" exception found in section 20(4). It is not suggested that the respondents' building, or any part of it, operates on an "adult only" basis, or that the apartment which is the subject of this dispute was located in such a facility. I am therefore satisfied that the respondents cannot invoke the protection of that provision.

Has the general protection against discrimination in section 2(1) of the Code been infringed in this case? The respondents will readily rent a two-bedroom apartment to four persons, provided only that no more than two

of those persons are children. Two parents and two children can, therefore, occupy the unit that is the subject of this dispute. The complainant, being in the position of a single parent with three children was denied access to the apartment, which would also have been occupied by four persons, solely because three of them were her children. If one had been her spouse there would have been no denial of the accommodation. A nuclear family of two parents and two children could freely have the unit while a single parent with three children could not. In these circumstances I find it impossible to conclude other than that the distinction drawn by the respondents in denying the unit to the complainant was based solely on "family status".

That is a distinction the legislation will not countenance. In the eyes of the Ontario Human Rights Code a family of four is a family of four and, subject to a reasonable requirement of parental presence and the tenancy being undertaken by a person with the legal capacity to contract, no further distinction can be made. The Legislature has deemed it appropriate, indeed urgent, to protect families and their children in their access to reasonable living accommodation. The Code does not permit landlords to impose their vision of the "normal" family to deny equal access to accommodation to single parents solely because of their family status.

It should be noted that this is not a case where the respondents have demonstrated some other reasonable grounds for denying the accommodation in question to the complainant. The apartment unit in question had two bedrooms and a den. Had the complainant chosen to occupy one bedroom

herself, assign two children to the second bedroom and use the den as a bedroom for her third child it would, in my view, be difficult to characterize that arrangement as an unreasonable use of the space or unacceptable overcrowding. There is no evidence to suggest that the respondents take any steps to limit the ability of other tenants to make use of their den either as an extra bedroom or as a permanent bedroom. The denial imposed upon the complainant and her children, however, discloses that a different and discriminatory standard was applied to them, based solely on their status as a single parent family with three children. That is a form of discrimination which the Ontario Human Rights Code does not permit. For these reasons the complaint must succeed.

The Board must next consider the appropriate remedy. In my view, this is not a case where the evidence reveals bad faith or knowing disregard of the law by the respondent landlords. As a general policy they do not deny families with children access to apartments in their buildings. Nor is it suggested that landlords are not entitled to impose some reasonable, non-discriminatory limitation on the number of persons who may occupy a given residential unit. In the instant case, prior to any reported adjudication of the new provisions of the Human Rights Code respecting family status and accommodation, the respondents in good faith adopted an interpretation of section 2 of the Human Rights Code differing from the interpretation of the complainant. In my view, while Boards of Inquiry should not be insensitive to the hardship suffered by complainants, they should also resist undue condemnation of respondents who attempt in good faith to adjust to a new legal

order. While it is true that the respondents' position ultimately caused some difficulty and personal distress to the complainant, I am satisfied that in this case she can be fairly compensated by an order for the return of her deposit monies, with interest. On the whole I am satisfied that this is not an appropriate case for an order under section 40(1)(b) of the Code.

For the foregoing reasons, the respondents are ordered to repay forthwith to the complainant the sum of $1,159.00, with interest calculated from October 23, 1984 to the date of payment, in compensation for the violation of her rights under section 2(1) of the Ontario Human Rights Code, contrary to section 8 of the Code. The respondents are further directed to cease and desist from denying access to residential accommodation by reason of discrimination based on "family status", and in particular to cease and desist in their practice of discriminating between two-parent families and single parent families in the granting of such accommodation.

DATED at Toronto this 17th day of March, 1987.

MICHEL G. PICHER
Chairperson